SUPREME COURT OF THE UNITED STATES.

No. 421.—October Term, 1920.

Alexander Kahn et al., Appellants, vs. August V. Anderson, Warden of the United States Penitentiary at Leavenworth, Kansas. } Appeal from the District Court of the United States for the District of Kansas.

[January 31, 1921.]

Mr. Chief Justice White delivered the opinion of the Court.

The petition for *habeas corpus* filed by the appellants on June 11, 1920, to obtain their release from confinement in the United States Disciplinary Barracks at Leavenworth having, on motion of the United States, been dismissed on the face of the petition and documents annexed, the appeal which is now before us was prosecuted. We are therefore only concerned with the issues which legitimately arise from that situation.

It was charged in the petition that on November 4, 1918, the petitioners were placed on trial before a general court-martial for violation of the 96th Article of War, in having conspired to murder a named fellow prisoner, and of the 92d Article in having committed the murder, and that at the time of the alleged commission of the crimes stated they were undergoing imprisonment in the barracks in question under sentences which had been imposed upon them by courts-martial for military offenses. It was averred that the legality of the organization of the court and its jurisdiction was at once challenged, and on the challenge being overruled, each of the petitioners was, on November 25, 1918, found guilty of the murder charged, and as the result of the action of the President in mitigating and approving the sentences, they were each liable for a long term of imprisonment.

The release which was prayed was based upon the following grounds: (1) Alleged illegality in the constitution of the court; (2) an assertion that the petitioners did not possess the military

status essential to cause them to be subject to the court's jurisdiction; (3) that their subjection, even if they possessed such military status, to be tried by court-martial, deprived them of asserted constitutional rights, and (4) that in no event had the court-martial power to try them for murder under the conditions existing at the time of the trial. We come to consider whether the court erred in overruling these contentions.

The 5th Article of War exacts that in any event a court-martial shall be composed of not less than five officers and must be composed of thirteen when that number can be convened without manifest injury to the service. The court in this case was composed of eight members, the order certifying that more than that number could not be convened without manifest injury to the service. The argument is that because the court was composed of less than thirteen officers it was unlawfully constituted. But it has long been settled that the exercise of discretion as to fixing the number of the court with reference to the condition of the service, within the minimum and maximum limits, is executive and not subject to judicial review. *Martin* v. *Mott*, 12 Wheat. 19, 34, 35; *Bishop* v. *United States*, 197 U. S. 334, 340. The objection is therefore without merit.

Of the eight members of the court two were described in the order as retired officers and three as officers of the United States Guards. The contention is that, as by the 4th Article of War one must be an officer in the military service of the United States to be competent to sit on a court-martial, and as retired officers and officers of the United States Guards are not within that requirement, the constitution of the court was void. But both contentions, we are of opinion, are untenable; as to the retired officers, because it is not open to question, in view of the ruling in *United States* v. *Tyler*, 105 U. S. 244, that such officers are officers in the military service of the United States, and because it is equally certain that the order assigning the retired officers to the court was within the authority conferred by the Act of April 23, 1904, c. 1485, 33 Stat. 264, which provides that: "The Secretary of War may assign retired officers of the Army, with their consent, to active duty . . . upon courts-martial . . ." As to the United States Guards officers, there can also be no doubt that the President was fully empowered by Section 2 of the Selective Ser-

vice Act of May 18, 1917, c. 15, 40 Stat. 77, to exert the power which he did by Special Regulations, No. 101, organizing the military force known as the United States Guards, and that such force, under the express terms of Section 1 of the same act, were a part of the Army of the United States, and that these officers were therefore competent to be assigned to court-martial duty.

As we have seen, the pleadings disclose that the alleged crimes were charged to have been committed by the accused while they were confined in a United States military prison undergoing punishment inflicted upon them, and upon this it is contended that either by implications resulting from the lengths of the sentences previously imposed and which were being suffered, or by assumption that there was a provision in the sentences to that effect, it resulted that the accused, by the convictions and sentences, ceased to be soldiers and were no longer subject to military law. But as the allegations of the petition and the contention based upon them concede that the petitioners were, at the time of the trial and sentence complained of, military prisoners undergoing punishment for previous sentences, we are of opinion that even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since as they remained military prisoners they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment. Thus, in dealing with that question, in *Carter* v. *McClaughry*, 183 U. S. 365, 383, it was said:

"The accused was proceeded against as an officer of the Army and jurisdiction attached in respect of him as such, which included not only the power to hear and determine the case but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

"He was a military prisoner though he had ceased to be a soldier, and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. (Rev. Stat., sec. 1361)." See in addition, Act of March 3, 1915, c. 143, 38 Stat. 1084; 2d Article of War, par. "e"; 16 Op. At. Gen. 292; *In re Craig*, 70 Fed. 969; *Ex parte Wildman*, Fed. Cas. 17,653a.

And as the authorities just referred to and the principles upon which they rest adequately demonstrate the unsubstantial char-

acter of the contention, that to give effect to the power thus long established and recognized would be repugnant to the 5th Amendment, we deem it unnecessary to notice the question further.

In connection with this subject we observe that a further contention, that conceding the accused to have been subject to military law, they could not be tried by a military court because Congress was without power to so provide consistently with the guaranties as to jury trial and presentment or indictment by grand jury, respectively secured by Art. 1, sec. 8, of the Constitution, and Art. 5, of the Amendments, is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained,—a situation which was so obvious more than forty years ago as to lead the court to say in *Ex parte Reed,* 100 U. S. 13, 21:

"The constitutionality of the acts of Congress touching the army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer open to question in this court. Const., art. 1, sect. 8, and amendment 5. In Dynes *v.* Hoover (20 How. 65), the subject was fully considered and their validity affirmed."

This brings us to the final contention, that because when the trial occurred it was time of peace no jurisdiction existed to try for murder, as Article 92 provided that " . . no person shall be tried by court-martial for murder or rape committed within the geogaphical limits of the States of the Union and the District of Columbia in time of peace." That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146. It is therefore difficult to appreciate the reasoning upon which it is insisted that although the Government of the United States was officially at war, nevertheless so far as the regulation and control by it of its army is concerned, it was at peace. Nor is it any less difficult to understand why reliance to sustain that proposition is placed on *Caldwell* v. *Parker,* 252 U. S. 376, since that case involved no question of the want of jurisdiction of a court-martial over a crime committed by a soldier, but solely whether the jurisdiction which it was conceded such a court possessed was intended to be exclusive of a concurrent power in the state court to punish the same act, as the mere result of a declara-

tion of war and without reference to any interruption, by a condition of war, of the power of the civil courts to perform their duty; and moreover in that case the question here raised was expressly reserved from decision.

Coming now to consider that question in the light (1) of the rulings in *Ex parte Milligan*, 4 Wall. 2; *Coleman* v. *Tennessee*, 97 U. S. 509; *Ex parte Mason*, 105 U. S. 696 and *Caldwell* v. *Parker*, 252 U. S. 376; (2) of the differences between the articles of 1874 and those of 1916 showing a purpose to rearrange the jurisdiction of courts-martial; (3) of the omission of the qualification, "except in time of war," from the clauses of the latter articles conferring jurisdiction as to designated offenses, including those capital (Articles 92 and 93), and its retention in the article dealing with the duty of the military to deliver to the state authorities (Article 74), and (4) of the placing in a separate article (Article 92) of the provision conferring jurisdiction as to murder and rape and qualifying that jurisdiction by the words, "in time of peace," not used in the previous articles, we are of opinion that that qualification signifies peace in the complete sense, officially declared. The fact that the articles of 1916 in other respects make manifest the legislative purpose to give effect to the previous articles as interpreted by the decided cases to which we have referred, at once convincingly suggests that a like reason controlled in adopting the limitation, "except in time of peace," contained in Article 92. See *McErath* v. *United States*, 102 U. S. 426, 438, where it was expressly decided that the limitation, "except in time of peace," on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed. Indeed, in that case it was pointed out that this significance of the words had received the sanction of Congress and had been made the basis for the adjustment of controversies depending upon the time when peace was established.

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.